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No. 57

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

COMMISSIONER OF INTERNAL REVENUE, *Petitioner*,

v.

WILLIAM I. CONNELLY and BERTHA CONNELLY, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF FOR RESPONDENTS.

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RESPONDENTS' STATEMENT OF THE CASE.

This case arises out of an alleged deficiency in the joint income tax liability of the respondents, William I. Connelly and his wife, Bertha Connelly, for the years 1943 and 1944, in the amounts of $433.59 and $227.10, respectively. Hereafter in this brief the word "respondent" refers to William I. Connelly, since the rights of both respondents are identical and derive solely from the status and circumstances of William I. Connelly.

As a result of many years of work for the government as a civil service employee, the respondent was a specialist in admiralty law and the legal aspects of maritime matters generally. On March 1, 1942, he became an employee of the United States Coast Guard in the capacity of a senior attorney, and assumed the position of Chief of the Admiralty and Maritime Section, Legal Division, Coast Guard Headquarters. (R. 23, 24)

In January 1943, he was asked to consider taking a commission as a temporary officer in the Coast Guard Reserve which had been established by Act of Congress of February 19, 1941, as amended (14 U. S. C. 301 et seq., 55 Stat. 1021), but he declined to take any steps at that time towards that end. (R. 24) Later he reconsidered and filed application for such a commission (R. 24), realizing that his specialized knowledge and experience would undoubtedly be useful to the Coast Guard, although he was not eligible for general sea duty because of his age of 49 years.

Thereupon, at five o'clock on the afternoon of February 19, 1943, he was sworn in and took the prescribed oath of office as an officer of the Coast Guard. (R. 23) On that date he was given the rank of Lieutenant Commander and assigned, full-time, active, special duties at Coast Guard Headquarters and informed that such uniforms as might be required would be furnished him. (R. 16, 17, 18) He signed the formal acceptance of enrollment as Lieutenant Commander and the written oath of office.

The respondent accordingly contends that by virtue of the terms of the Coast Guard Reserve Act, Title 14 U. S. C. § 307, 56 Stat. 1021, he became a commissioned officer of the Coast Guard Reserve and was thereby entitled to exclude $1500 from his gross income subject to tax by virtue of Section 22(b) (13) (A) of the Internal Revenue Code, and that he remained in the status of commissioned officer with the privilege of the said exclusion in full force until his disenrollment, under honorable conditions after satisfactory service, on September 15, 1945. (R. 15).

The respondents filed their tax returns in due course for the years 1943 and 1944, claiming the benefit of the said exclusion, but the petitioner sent the respondents a notice of deficiency in the amounts indicated above. The respondents petitioned the Tax Court for relief, but failed to prevail in that tribunal. They appealed to the United States Court of Appeals for the District of Columbia Circuit, which reversed the decision of the Tax Court after a full hearing on the merits. The Commissioner of Internal Revenue successfully petitioned this Court for a writ of certiorari to the Court of Appeals.

The respondent contends that the decision of the Court of Appeals was entirely correct and should be affirmed by this Court.

SUMMARY OF ARGUMENT.

The decision of the Court of Appeals should be affirmed because, under Sec. 22(b) (13) (A) of the Internal Revenue Code, the respondent was entitled to exclude from his gross income $1500 for both 1943 and 1944 by virtue of his being a commissioned officer of the Coast Guard Reserve, on full-time active duty.

The clear language of the Internal Revenue Code gives him the right to this exclusion, and no hidden or unexpressed intention of Congress can be properly invoked to deny him this right.

The fact that the respondent's pay check was taken from funds originally appropriated for civilian activity of the Coast Guard does not preclude his right to the exclusion since the Internal Revenue Code allows the exclusion to be taken from "compensation received for active duty as a commissioned officer" of the naval forces.

The case of *Mitchell et al. v. Cohen*, 333 U. S. 411, is not controlling, or even persuasive, authority as to the case at bar since the question there involved the rights of an entirely different group of men under an entirely different law. In the *Cohen* case the clear intent of Congress on the

particular issues of that legislation appear in the Congressional Record. No such evidence has been found as to the intent of Congress in relation to the issues of this case, except as that intent appears in the clear language of the Internal Revenue Code.

ARGUMENT.

There is no doubt that the respondent was a commissioned officer of the Coast Guard Reserve on full-time active duty with the rank of Lieutenant Commander (R. 16), and later Commander (R. 19); that he was subject to military call 24 hours a day (R. 20), that he was subject to full military discipline, including court martial (R. 17), that he had full military authority over officers and men of inferior rank; that he was required to wear his uniform at all times; that he was expected to live up to the rules of military custom and etiquette (R. 30); that he was accorded military privileges not available to civilians (R. 26, 27, 28), such as Ships Service Stores, Franking Privilege, Officers' Mess, Wine Mess, War Ballot, Badges & Medals, Burial in Arlington.

This follows directly the requirements of § 305 of the Coast Guard Reserve Act, 14 U. S. C. 305, which says:

> "Members of the Reserve while engaged on active duty shall be vested with the same power, authority, rights and privileges, as members of the regular Coast Guard of similar ranks, grades, or ratings."

It has been stipulated by the parties that there is only one Coast Guard Reserve and it is composed of regular and temporary members. (R. 15)

The Petitioner is Entitled to Exclude $1500 From the Compensation He Received During the Years 1943 and 1944, for Active Service Because He Was a Commissioned Officer of the Coast Guard Reserve.

The respondent was enrolled in the Coast Guard Reserve under the provisions of the Coast Guard Reserve Act of 1941, 14 U. S. C. 307, 56 Stat. 1021, which provides:

> "*The Commandant*, with the approval of the Secretary of the Treasury or of the Secretary of the Navy, while the Coast Guard is operating as a part of the Navy, *is hereby authorized to enroll as temporary members of the Reserve, for duty under such conditions as he may prescribe*, including but not limited to part-time and intermittent active duty with or without pay, and without regard to age, members of the Auxiliary, such officers and members of the crew of any motorboat or yacht placed at the disposal of the Coast Guard, and *such persons (including Government employees without pay other than the compensation of their civilian positions) who by reason of their special training and experience are deemed by the Commandant to be qualified for such duty*, as are citizens of the United States or of its Territories or possessions, including the Philippine Islands, *to define their powers and duties, and to confer upon them such appropriate to their qualifications and experience, the same ranks, grades, and ratings as are provided for the personnel of the regular Coast Guard Reserve. When performing active duty with pay, as herein authorized, temporary members of the Reserve shall be entitled to receive the pay and allowances of their respective ranks, grades, or ratings, as may be authorized for members of the regular Coast Guard Reserve.*" (Italics supplied for clarity)

Section 22(b) (13) (A) of the Internal Revenue Code provides:

> Sec. 22. Gross Income
>
> (a) • • •

(b) *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

(1) * * * (12) * * *

(13) [* * *] *Additional allowance for military and naval personnel.*

"(A) In the case of compensation received during any taxable year and before the termination of the present war as proclaimed by the President, *for active service as a commissioned officer* (or a commissioned warrant officer) *in the military or naval forces of the United States* during such war or in the case of a citizen or resident of the United States, as a member of the military or naval forces of any of the other United Nations during such war, *so much of such compensation as does not exceed $1,500.*" (Italics supplied for clarity)

It is the respondent's contention that he is entitled to exclude from the compensation he received for his military service, $1,500 for both the years 1943 and 1944. The decision of the Tax Court held that he was not so entitled because he was not a "commissioned officer" and because the pay received was taken from appropriations for civilian activity, thereby making it "civilian" rather than "military" pay. The Coast Guard Reserve Act as quoted above requires that those in the category of the respondent serve "without pay other than the compensation of their civilian positions." But the Court of Appeals was quick to discern that the decision of the Tax Court did not fit the factual situation properly into the language of the statute. Consequently, it reversed the Tax Court's decision.

The Court of Appeals reasoned that the respondent, Connelly, received *as* compensation *for* active military service the pay *of* his civilian position, exactly as the Tax Code and the Coast Guard Reserve Act provide. The Court addressed itself directly to this point with extraordinary clarity:

"To reach the conclusion that petitioner's compensation was not for service in the naval forces, we would

have to hold that he worked full time for no compensation while, at the same time he received full compensation for no work. The facts are that he was engaged in full-time active duty in the naval forces, and he received compensation. We think he received the compensation for the work." — U. S. App. D. C. —, 172 F. 2d 877, 880.

No Necessity or Occasion for Elaborate "Statutory Construction."

The petitioner is in effect asking this Court to add to the tax statute language which might read, "provided that such compensation is not derived out of funds appropriated for non-military departments or agencies," or "provided such compensation is not the pay of his civilian position." However, no such addition to the statute or interpretation of it is justifiable or intended by Congress. The language of the statute is plain and clear in the ordinary meaning of its words. It does not lead to an absurd or futile conclusion, or to one clearly contrary to the general purpose of the legislation or to public policy.

The language of Mr. Justice Brown in *Hamilton v. Rathbone*, 175 U. S. 414, at page 421 is pertinent:

> "Indeed, the cases are so numerous in this court to the effect that the province of construction lies wholly within the domain of ambiguity, that an extended review of them is quite unnecessary. The whole doctrine applicable to the subject may be summed up in the single observation that prior acts may be resorted to, to *solve*, but not to *create* an ambiguity." (Italics as in original opinion)

The petitioner devotes a large portion of his argument to the proposition that "compensation received for active service as a commissioned officer" must mean "military pay." It seems almost prophetic that Congress should use the lengthier and more complicated phrase that actually appears in the statute, since by its very terms, it clearly allows the respondent, Connelly, to take the $1,500 exclusion

whereas had the simpler and shorter phrase been enacted into law, there might have been room for doubt.

The petitioner goes into elaborate research and discussion of various statements by witnesses before legislative committees and on the floor of Congress in the hope of proving that "compensation received for active service as a commissioned officer" should be deemed synonymous with "military pay," and that the statute should be so interpreted by this Court. But the argument falls when it is realized that *nowhere* in any of the discussions skirting the particular question at bar *was the situation of this particular, small group of officers directly considered.* In no other instance that the respondent has been able to discover, among the innumerable classifications of officers and enlisted men in the military establishment as a whole, has the law provided that an officer shall serve "without pay other than the compensation of their civilian positions." In short, the respondent's situation was unique and the legislators did not have his particular case in mind when considering the language to be enacted into law, and therefore, the petitioner's position, that his construction of the statute is supported and required by its legislative history, is untenable.

The plea of unexpressed legislative intention is not new, and its limitations are well known. The Court of Appeals followed precisely the rules so well established by this Court when it said:

> "We are urged to ascertain an unexpressed intendment in the revenue act. The language of that act is direct and unadorned. It grants an allowance 'In the case of compensation received . . . for active service as a commissioned officer (or a commissioned warrant officer) in the military or naval forces of the United States during such war'. If Commander Connelly fits those clear requirements, he is entitled to the allowance. We think that no hindsight, subtlety or assumed mental reservation on the part of Congress should deprive him of it." 172 F. 2d 877, 880.

It is curious to note, and probably significant, that the petitioner has apparently abandoned the argument that the respondent, Connelly, was not a "commissioned officer" in spite of the fact that the Tax Court agreed with him on that point. (R. 40) The petitioner is now drawing away from the argument as to the significance of the respondent's "military status," and contending that it is of no importance in arriving at a proper decision in this case, on the authority of *Mitchell v. Cohen, supra*. As will be more fully developed in the discussion of that case following in this brief, the *Cohen* case cannot be considered as authority for that proposition.

Thus, the petitioner is left with one final argument, the entirely novel idea that the "Taxpayer received no compensation 'for active service as a commissioned officer;' his compensation came solely from his civilian position with the Coast Guard which he continued to hold." (Pet. Brief 27)

The facts in the record, as stipulated by the parties and adduced by the uncontradicted testimony of Connelly himself, who was the only witness to appear, clearly indicate that he devoted his entire effort, full-time, to his job in the legal division of Coast Guard Headquarters. (R. 14, 16, 20) He joined the Reserve only after being directly urged to do so, and upon the commencement of his duties in uniform considered himself to be performing military functions and military duty. (R. 24) His conclusions on this point were entirely correct in the light of the terms of his enrollment. (R. 16, 17) The fact of the matter is that the War changed the respondent, Connelly's, job from a civilian to a military job. Connelly's personal history gives the clearest indication that the Coast Guard recognized that fact and took appropriate action by changing him from a civilian to a military man.

Decision to Change Respondent's Status a Purely Administrative Matter.

No point of law is better settled than that the judiciary will refrain from reviewing matters of internal administration of executive agencies, unless there should be involved a question of unconstitutionality or the violation of a statute. The decision to change Connelly's status from civilian to military was clearly within the scope of authority of the Commandant of the Coast Guard (14 U. S. C. 307, 56 Stat. 1021) and the fact that it carried with it certain implications as to tax liability does not bring it within the category of decision which the Courts will review. The Court of Appeals took this position and explained why it did so.

> "We do not see how similarity of duties can erase the distinction between civilian and military service. If it be attempted, an appalling confusion would arise. All sorts of questions would be presented as to the thousands of industrialists who were inducted or commissioned and assigned to operate plants, or to command patrol boats, and as to military personnel on duty at the Pentagon, and as to quartermaster and supply corps personnel dealing in clothing and equipment, and so on *ad infinitum*. We do not know why the Executive Department of the Government chose to translate each of scores of civilian operations into military and naval operations for the conduct of the war; and to induct into the military and naval services the accompanying personnel. And it is not our function to inquire why, although common sense indicates that total war is best conducted by military methods, means and men throughout. We know that it was done, and that is sufficient for our purposes. * * * *
>
> When, for purposes of war, the Executive Department translates civilian duties into military duties and inducts personnel from civilian status to military status, and when Congress enacts legislation applying to military duties and military personnel, without further definition, the courts should simply accept those determinations. In such cases, the courts, in our view, should simply apply the long-established criteria—

oath of office, military duty, and subjection to military discipline." 172 F. 2d 877, 879.

There can be no dispute that the respondent took on a military status at the time he took his oath. On this point, Mr. Justice Douglas said in *Billings* v. *Truesdell*, 321 U. S. 542 at page 559:

> "* * * a selectee becomes 'actually inducted' within the meaning of § 11 of the Act when in obedience to the order of his board and after the Army has found him acceptable for service he undergoes whatever ceremony or requirements of admission the War Department has prescribed."

Although the question in that case was primarily the *time* when military status attached, it is submitted that this opinion is also authority for the collateral proposition, that military status actually attaches to an officer of the Coast Guard Reserve after the Commandant has found him acceptable for service and he undergoes whatever ceremony or requirements of admission the Coast Guard has prescribed.

Respondent's Status of Primary Importance.

Despite the learned brief submitted on behalf of the Commissioner of Internal Revenue, and in direct opposition thereto, the respondent, Connelly, contends that his status, as a commissioned officer in the naval forces of the United States, is the very cornerstone of the whole situation. To say that this "Court unmistakably held in *Cohen* that the question of 'status' was beside the point" (Pet's. Brief, 17, 18), is entirely unwarranted and completely fallacious. As pointed out more fully later in this brief, the Court in effect held that Cohen's peculiar situation and the particular language of the statute under consideration in that case warranted a search beyond the dictionary definition of "ex-service men" to determine whether Congress intended men in Cohen's situation to have the benefits of

the Veteran's Preference Act, and in so holding, it was necessarily decided that in questions of the nature of the *Cohen* case, the status of Cohen might not be the sole determinant in the case. It is definitely *not a fact* that by its decision in the *Cohen* case this Court held that "The standard of military 'status' had been explicitly cast aside." (Pet. Brief 49) The Court's attention in the *Cohen* case was directed solely to the Veteran's Preference Act of 1944, which has nothing to do with the questions at bar, which arise under the Internal Revenue Code.

Sacrifice Not Prerequisite to Right to Exclusion.

On the question of benefit received, the petitioner takes the position, apparently, that war service must cause some pecuniary sacrifice to the individual concerned in order for him to fall within the class entitled to the $1,500 exclusion. (Pet. Brief 19, 20, 21) The fallacy of that argument readily appears upon even the most cursory reading of the statute, and when the situation of the regular career officer, Army, Navy or Coast Guard, is recalled, it can be demonstrated that far from a sacrifice, the War-inspired exclusion actually amounted to a raise in pay for them. No one, however, has so far questioned their right to the exclusion. It would have been so easy for Congress to make *sacrifice* the criterion for the exclusion, or even its dollar for dollar measure, that the fact that they did not do so can mean only that they did not *intend* to do so. Congress instead made the receipt of "compensation for active duty as a commissioned officer of the naval forces" the criterion. Therefore, the respondent's pay during the period in question, for the work he did, being compensation for his service entitles him to take the exclusion.

Apart from and beside all the arguments above, it is further respectfully submitted that respondent did suffer an economic hardship by reason of his service. He was an expert in maritime legal affairs, and in a civilian status he was free to accept employment outside the government

service at any salary he could bargain to get, or in the government service, with any other agency needing men of his qualifications, from which he might have been able to obtain a higher civil service rating. The United States Coast Guard, it is fair to assume, was advertent to this situation, and in prevailing upon him to enter the Reserve, it froze him in the position he held and availed itself of his ability and experience, by making him an officer subject to all military orders and discipline. This is quite different from the situation applicable to Cohen, who was a War Department economist, who was at libery to take any position he pleased at all times, and regardless of his intermittent military status in the Coast Guard Reserve.

The Double Negative.

The petitioner seems to have become confused by the double negative in the language of the Coast Guard Reserve Act, 14 U. S. C. 307, that is to say: "*without* pay *other than* the compensation of their civilian positions." Turning the double negative into its resultant affirmative it would read; "with the pay of their civilian positions but without other pay." When read in that fashion, the phrase clearly demonstrates that it is present in the Act for the sole purpose of fixing the *rate of pay* of those persons affected by it. Two reasons for such language are self evident. Congress did not want those in the respondent's class to be drawing double pay, civilian and military, and at the same time, did want to assure them that their income would remain stable at the level to which they had presumably become accustomed. In other words, while their jobs and their personal status had been changed by the War from civilian to military, their pay would remain the same. That the petitioner agrees with the respondent on this point is indicated on page 28 of his brief, where he says:

> "The critical language of Section 22(b) (13) (A) ['compensation received * * * for active service as a commissioned officer * * *'] we think plainly means the amount paid to the taxpayer for service as an officer."

However, the respondent is unable to agree that from that fact can be derived the proposition that the compensation must be "military pay" in order to entitle the taxpayer to the exclusion. *Nowhere in the statute does the phrase "military pay" appear.*

Privileges of Rank Not Controlling.

There is nothing illogical or contradictory in the fact that some of the privileges of officers of other classifications in the Coast Guard were withheld from the men in the respondent's classification, or that certain privileges of their former civilian status were not cut off when they enrolled in the Reserve. Any number of differences in privilege occur between Regular Officers of the Coast Guard and Reserve Officers, but that makes the latter none the less Officers of the Coast Guard. So also, there were numerous differences between the privileges available to permanent members of the Reserve and temporary members. Similarly that cannot be said to deprive Connelly of his membership in the Reserve. In fact, probably the greatest differences of all occurred among the six different classes of temporary members of the Reserve as pointed out in the *Cohen* opinion, *supra*. See footnote 6 on page 413.

The fact that some civilian attributes and privileges remained with the respondent after he took up his military status reflects what was undoubtedly the belief of the Coast Guard authorities, that when the War was over the natural characteristics of such jobs as the respondent, Connelly's, could normally be expected to revert back to civilian, and it was not unreasonable to expect many of the temporary members of the Reserve to go back to their same old jobs again, as civilians in the civil service. Thus, the disturbance of the continuity of the respondent's civil service record was held to a minimum.

The Cohen Case.

In spite of the foregoing, the petitioner contends that the Court of Appeals was wrong in not denying the respondent the right to exclude $1,500 of his pay from gross taxable income, saying that the decision of this Court in *Mitchell* v. *Cohen*, 333 U. S. 411, precludes the respondent from his rights under Section 22(b) (13) (A) of the Internal Revenue Code. The pertinent clauses of that section are repeated for convenience:

> "Additional allowance for military and naval personnel. (A) In the case of compensation received * * * for active service as a commissioned officer * * * in the military or naval forces of the United States during such war * * *, so much of such compensation as does not exceed $1,500."

The *Cohen* case had no tax implications whatsoever, but was concerned solely with whether a man in the Volunteer Port Security Force (another of the six different classes of temporary membership in the Coast Guard Reserve) was entitled to the rights of an "ex-serviceman" under the Veterans' Preference Act of 1944. In contrast to the full time active military duty the respondent, Connelly, performed for about two and a half years, Cohen never gave up his civilian job as an economist in the War Department, was required to put in a minimum of only 12 hours a week on duty, was in a military status *only* when actually on duty, continued to draw full pay for his regular work as a civilian economist, drew no pay whatsoever for his part-time military duty, and in fact, put in total service of only 398 *hours*. 333 U. S. 411, 415.

In view of the non-technical word, "ex-serviceman", having been used in the Veterans' Preference Act, this Court found it necessary to go beyond the Act itself for its true meaning. Search revealed that Congress had treated this *very question* as to this *particular group* of men in its deliberations on an Amendment to the Act. (Note: Congress did

not treat the particular group which included the respondent, Connelly, when enacting the Tax statute.) The House passed the amending bill, and the Senate Committee on Civil Service reported the bill favorably, but the Senate later adjourned without considering the bill. In a footnote to the decision, 333 U. S. 411, 421, the following appears:

> "The proponents of the bill and the two committees considered it as a clarification of the original Congressional intent as to the meaning of 'ex-servicemen.' It was stated that the country owes a debt of gratitude to the temporary Coast Guard Reservists, *'but they are not to be classed as ex-servicemen,* who were actually uprooted from their civilian occupations and subjected to the rigors of full-time military training and combat. It is to the latter group that Congress intended to provide employment preference in Government service.' 93 Cong. Rec. 7315." (italics supplied)

Mr. Justice Murphy recognized the foregoing as an expression of Congressional intent on the very question before him and wrote his opinion accordingly.

However, the impact of the *Cohen* case was meant to be felt by the "Force" (the Volunteer Port Security Force) since over and over again the word "Force" is used in the opinion to designate the group with which that case was concerned. There is no indication that the *Cohen* opinion was even meant to settle the rights of men in the position of the respondent, Connelly, under the Veterans' Preference Act, much less under the Internal Revenue Code.

But it is in matters of fact that Cohen's situation, both personal and legal, is so vastly different from the respondent, Connelly's. For instance, Cohen would have been subject to arrest by civilian police and prosecution by the District Attorney if he had worn his uniform to work: Connelly would have been subject to court martial if he had *not*. (See 333 U. S. 411, 414, and R. 24) Cohen's government pay check was for his work at his civilian job as a War Department economist. Connelly's government pay

check was for his work at his military job in Coast Guard Headquarters. No such decision was ever made by the War Department authorities changing Cohen's job from civilian to military. Cohen's military work consumed only his hours off work from his civilian job. Connelly had no such hours available by virtue of his being on full-time active duty.

It is thus abundantly clear that the Court of Appeals properly distinguished the case at bar from the *Cohen* case.

Petitioner's Conjectures as to Facts Not in the Record.

On page 7 of the petitioner's brief appears the following statement:

> "He (referring to the respondent, Connelly) probably could resign for his 'own convenience' and could not be transferred without his permission."

There is absolutely nothing whatsoever in the record to support either of the two quoted conjectures and they should therefore be given no consideration by the Court in arriving at its decision. Furthermore, if the petitioner should insist on making an issue of fact on those two points, a new trial will have to be held to resolve the issues. If such a trial were to be held, the respondent is prepared to offer testimony on both issues.

As to the first issue he would testify that he was called before three different admirals when he earnestly tried to resign, that his requests were not granted and he was ultimately persuaded to cease his efforts to resign.

As to the second issue, he would be prepared to offer documentary evidence that at least one other officer in his category was sent to Europe under orders during wartime without having an opportunity to express himself at all, much less give his permission.

Instead of pressing for a new trial on these relatively unimportant issues, the respondent respectfully suggests that they be given no consideration by the Court.

Appendix B of Petitioner's Brief

The respondent respectfully and reluctantly invites the attention of the Court to the fact that the first four of the six documents included in Appendix B of the petitioner's brief are not part of the record of this case. The last two documents in the Appendix were regularly offered and admitted in evidence before the Tax Court, thereby becoming a proper part of the record of the case.

The four documents are represented to be:

1. Commandant's Circular 5-46 dated January 22, 1946, beginning at page 47 of petitioner's brief.

2. Memorandum for Chiefs of Officers and Divisions at HQ, dated March 10, 1944, signed by the Commandant, beginning on page 57 of petitioner's brief.

3. Personnel Circular 16-48, dated April 20, 1948, beginning at page 59 of petitioner's brief.

4. Personnel Bulletin 75-45 dated August 8, 1945, beginning on page 61 of petitioner's brief.

None of the six documents in Appendix B purport to be matters of which this, or any other, Court would take judicial notice. As to the first four documents, there has not even been afforded the respondent the opportunity of questioning their authenticity, much less their materiality or relevance to the issues of the trial. In fact, the third document listed above is dated *after the hearing of this case in the Court of Appeals.*

In view of the foregoing, the respondent respectfully suggests that the Court give no consideration to the four documents listed above, or weight to any argument which is based therein.

The only allusion to an appendix in the rules of this Court is in Rule 27 where the following statement appears: "If the statutes are long they should be set out in an appendix." Statutes comprise no part of petitioner's Appendix B.

CONCLUSION.

The decision of the Court of Appeals is entirely correct and should be affirmed.

Respectfully submitted,

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